Supreme Court, U.S.
FILED
DEC 17 1991
OFFICE OF THE CLERK

NO. 91-755

In The Supreme Court Of The United States

October Term 1991

CORAL CONSTRUCTION COMPANY and OREGON COLUMBIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

Petitioners,

v.

KING COUNTY, WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

John F. Bradach
Counsel of Record
STOEL RIVES BOLEY JONES & GREY
900 SW Fifth Avenue, Suite 2300
Portland, OR 97204-1268
(503) 294-9379 or (503) 224-3380

Wm. Bradford Reynolds
ROSS & HARDIES
888 - 16th Street, NW, Suite 300
Washington, DC 20006-4103
(202) 296-8600

Counsel for Petitioners Coral Construction Company and Oregon Columbia Chapter of the Associated General Contractors

December 17, 1991

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REASONS FOR GRANTING THE WRIT 2

I. The Petition Raises Important Issues of Law Fundamental to the Further Conduct of the Case 2

II. The Split in the Circuits Warrants This Court's Guidance 4

CONCLUSION 5

TABLE OF AUTHORITIES

Cases	Page
Britton v. South Bend Community School Corp., 775 F.2d 794 (7th Cir. 1985), *vacated*, 783 F.2d 105 (7th Cir. 1986), *on rehearing*, 819 F.2d 766 (7th Cir.), *cert. denied*, 484 U.S. 925 (1987)	5
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)	3
J.A. Croson Co. v. City of Richmond, 822 F.2d 1355 (4th Cir. 1987), *aff'd*, 488 U.S. 469 (1989)	5
Janowiak v. Corporate City of South Bend, 750 F.2d 557 (7th Cir. 1984), *vacated*, 481 U.S. 1001 (1987), *on remand*, 836 F.2d 1034 (7th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989)	5
Land v. Dollar, 330 U.S. 731 (1947)	2
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)	2
Michael v. United States, 454 U.S. 950 (1981)	3
Michigan Road Builders Ass'n, Inc. v. Milliken, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1062 (1989)	4, 5
United States v. General Motors Corp., 323 U.S. 373 (1945)	2
Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981) *cert. denied*, 454 U.S. 1124 (1981)	5

In The Supreme Court Of The United States

October Term 1991

CORAL CONSTRUCTION COMPANY and OREGON COLUMBIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

Petitioners,

v.

KING COUNTY, WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS'[1] REPLY BRIEF

[1] Petitioner Coral Construction Company is an Oregon corporation. Its parent company is MNC Investment Incorporated, an Oregon corporation. Petitioner Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. is an Oregon nonprofit corporation and has no parent company or subsidiaries.

REASONS FOR GRANTING THE WRIT

I. The Petition Raises Important Issues of Law Fundamental to the Further Conduct of the Case.

Respondent suggests that a writ of certiorari is inappropriate in this case due to its "unique procedural posture." Respondent's Brief at p. 9. In this regard, respondent argues that the constitutional issues raised by the admission of post-enactment evidence (never placed before or considered by the enacting legislative body) may be moot if Coral Construction Company ("Coral") ultimately prevails at trial. *Id.* at p. 10.

Respondent's argument ignores the well-settled rule that the interlocutory nature of a judgment does not preclude the issuance of a writ of certiorari in cases involving important issues of law fundamental to the further conduct of the case. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). In rejecting a similar argument, Justice White, with whom Justice Brennan and Justice Powell joined, stated:

> [T]he Solicitor General opposes the petition, arguing that if petitioner is acquitted following a trial on the merits, his claims will be moot. But this would leave the conflicts among the Circuits unresolved, conflicts that are now ripe for our atten-

> tion. Where there is an important and clear-cut issue of law which is fundamental to the further conduct of the case and which would otherwise qualify as a basis for certiorari, interlocutory status need not preclude review.

Michael v. United States, 454 U.S. 950, 951-52 (1981) (White, J., with whom Justice Brennan and Justice Powell join, dissenting to denial of certiorari).

In the present case, a determination of whether the district court may consider post-enactment evidence in addressing the constitutionality of the challenged ordinance is fundamental, if not decisive, to this case. Further, the importance of the federal constitutional issues presented extends beyond the facts of this case. The propriety of a federal district court considering post-enactment evidence never considered by the enacting legislative body, in an effort to discern legislative purpose and intent, raises significant issues of federalism and the exercise of judicial powers which warrant this Court's attention.

The Ninth Circuit's decision is twice flawed. It improperly permits local legislative bodies to enact racial classifications on less than a compelling basis and compounds the error by assigning to the courts a uniquely legislative function on review of such classifications. This Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) instructs otherwise.

This Court should also reject respondent's contention that the district court may conclude that Coral's prayer for declaratory and injunctive relief is moot due to subsequent amendments of the set-aside ordinance. Of course, Coral Construction's damage claim is not moot, and contrary to respondent's suggestion, the predominant and significant aspects of the challenged ordinance remain in effect under the 1990 amendments. In particular, the scope of the racial preference, found overly broad by the Ninth Circuit, remains unchanged.

II. The Split in the Circuits Warrants This Court's Guidance.

Plenary review should be granted because of the demonstrated conflict in the circuits as to the propriety of receiving post-enactment evidence to support a racial preference. Respondent's contention that the Sixth Circuit's decision in *Michigan Road Builders Ass'n, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1062 (1989), does not conflict with the Ninth Circuit's decision in this case is plainly incorrect. In contrast to the Ninth Circuit's conclusion that post-enactment evidence may be considered on remand, the *Milliken* court expressly recognized the importance of evaluating the evidence presented to the legislative body. The court explained that it

> must decide whether the Michigan legislature, *based upon the evidentiary factual record before it*, "had a firm basis for believing

> that such action was required based on prior discrimination" by the state itself.

834 F.2d at 590 (quoting *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1360 (4th Cir. 1987), *aff'd*, 488 U.S. 469 (1989)).

Michigan Road Builders is in accord with a number of other circuit court decisions which confine judicial review in similar circumstances to the evidence that was before the legislature. *Valentine v. Smith*, 654 F.2d 503, 508 (8th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981); *see also Janowiak v. Corporate City of South Bend*, 750 F.2d 557, 564 (7th Cir. 1984), *vacated*, 481 U.S. 1001 (1987), *on remand*, 836 F.2d 1034 (7th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989); and *Britton v. South Bend Community School Corp.*, 775 F.2d 794, 810 (7th Cir. 1985), *vacated*, 783 F.2d 105 (7th Cir. 1986), *on rehearing*, 819 F.2d 766 (7th Cir.), *cert. denied*, 484 U.S. 925 (1987). The Ninth Circuit's holding below is to the contrary.

CONCLUSION

Coral's petition raises important issues of law fundamental to the further conduct of this case. Without regard to the outcome of this case at trial, the Ninth Circuit is in direct conflict with the decisions of other the circuits as to the consideration of post-enactment evidence of discrimination to justify a racial preference. Accordingly, petitioners respect-

fully urge that the instant petition for a writ of certiorari be granted.

Respectfully submitted,

STOEL RIVES BOLEY JONES & GREY

John F. Bradach
Counsel of Record
900 SW 5th Avenue, Suite 2300
Portland, OR 97204-1268
(503) 294-9379 or (503) 224-3380

ROSS & HARDIES
Wm. Bradford Reynolds
888 - 16th Street, NW, Suite 300
Washington, DC 20006-4103
(202) 775-4730

Counsel for Petitioners Coral Construction Company and Oregon Columbia Chapter of the Associated General Contractors

December 17, 1991